TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 182.

THE BALTIMORE AND OHIO RAILROAD COMPANY, APPELLANT,

vs.

THE STATE OF WEST VIRGINIA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED OCTOBER 15, 1886.

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INDEX.

	Original.	Print.
Order to docket cause	1	1
Transcript from State court	2	1
Bill of complaint	3	1
Exhibit A—Statement as to taxes	4	3
Order denying petition for removal, &c.	7	4
Demurrer to bill	8	5
Petition for removal	8	5
Bond for removal	11	7
Bond for removal	13	7
Clerk's certificate	14	8
Motion to remand to State court	15	9
Order to remand to State court	15	9
Order allowing appeal	15	9
Bond	16	10
Citation (copy)	18	11
Clerk's certificate	19	11

JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 8, 1889.

1 At a circuit court of the United States for the district of West Virginia, continued and held at Parkersburg, in said district, on the 14th day of January, 1886, the following order was made and entered of record, to wit:

THE STATE OF WEST VIRGINIA
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } In Equity.

This day came the defendant, by John A. Hutchinson, Esquire, its attorney, and presented to the court an authenticated copy of the record in the above-entitled cause from the circuit court of Ohio county, West Virginia, and, on his motion, it is ordered that said cause be docketed in this court for further proceedings to be had therein.

The record referred to in the foregoing order is in words and figures following, to wit:

Record.

WEST VIRGINIA:

Pleas and proceedings before one of the judges of the circuit court of Ohio county, at the court-house of said county, on the 10th day of October, 1885, and in the 23rd year of the State.

Be it remembered that heretofore, to wit., on the 30th day of April, 1885, came the State of West Virginia, by its attor-
2 neys, and sued out of the clerk's office of the circuit court of Ohio county a writ of summons in chancery against the Baltimore and Ohio Railroad Company; which writ, with the endorsement thereon of service, is omitted from this record.

And at another day, to wit., at rules, held in the clerk's office of the said court, on the first Monday in July, 1885, a decree *nisi* was awarded against the said defendant. Thereupon came the complainant, by its counsel, and filed his bill and exhibit therewith against the defendant, which are in the words and figures following, to wit:

Bill of Complaint.

In the Circuit Court for Ohio County, West Virginia.

THE STATE OF WEST VIRGINIA
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

The bill of complaint of the State of West Virginia, complainant, against the Baltimore and Ohio Railroad Company, defendant.

The complainant respectfully represents that in the years 1873,

1874, 1875, 1876, 1877, 1878, and 1879 the Baltimore and Ohio Railroad Company owned a railroad, road-bed, and track many miles in length, and also depot grounds, station-houses, and other valuable real estate, all situate in the county of Jefferson, in said State, and in the same years said railroad company owned a large amount of rolling stock and other personal property, whereof a certain part was apportioned to said county for the assessment and payment of taxes, and in the aforesaid years, respectively, there was duly and regularly assessed against the said real and personal property of the Baltimore and Ohio Railroad
3 Company which lay within or was apportioned to the county of Jefferson, in said State, a large amount of taxes, which taxes ought to have been paid by the defendant into the treasury of the State in liquidation and payment of the assessment and apportionment of the taxes upon so much of the defendant's real estate as lay within the limits of the county of Jefferson, in said State, and so much of its personalty as was apportioned to said county, the said taxes being due and payable as an assessment and apportionment in favor of said county and of the school districts therein, in such amount and proportion as will be found set out in Exhibit "A," herewith filed and prayed to be taken as a part of this bill. Said exhibit also shows the total valuation for each year mentioned of the real estate in the said county and the personalty apportioned thereto, as well as the valuation thereof, for each district in said county, and said exhibit also shows the rate of levy in said county and each district thereof for each of said years. Complainant further charges that heretofore, to wit, on the 13th day of September, 1882, she demanded the said delinquent taxes from the defendant, but the defendant refused payment thereof. The said delinquent taxes amount to $25,311.17, a large part whereof were taxes on defendant's real estate in said county. Complainant further charges that by the law of this State a lien exists upon the realty belonging to the defendant within the limits of said county for so much of said taxes as were assessed upon said realty, with interest thereon from the 20th day of January next succeeding the years for which they were respectively levied. The said Baltimore and Ohio Railroad Company is a corporation of the State of West Virginia. Complainant therefore prays that the defendant named in the caption may be made defendant by proper process, and required to
4 answer this bill; that an account may be taken, if necessary, to ascertain how much of said assessments and apportionments was assessed against the real estate of said company situated in said county and how much was assessed against the personalty within or apportioned to said county; that a personal decree may be taken in favor of complainant for so much of said taxes as was so assessed upon the personalty of the defendant, with interest thereon from the 20th day of January next succeeding the year for which they were respectively levied, and that such portion of said taxation as may be ascertained to have been assessed against the realty of the defendant situated in the county of Jefferson may, with interest thereon as aforesaid, be declared a lien upon the same real

estate, and said lien enforced by the court of chancery; and complainant prays for further and general relief.

D. B. LUCAS,
W. P. HUBBARD,
Solr's for Complainant.

EXHIBIT "A" OF BILL.

	Year.	Valuation.	Rate of levy.	Amount of tax due.
Jefferson county	1873	$588,092	60 cts. on $100	$3,528 55
	1874	588,092	45 cts. on $100	2,646 40
	1875	588,092	30 cts. on 100 dollars	1,764 27
	1876	588,092	15 cts. on 100 "	882 13
	1877	601,763	30 cts. on 100 "	1,805 28
	1878	515,789	30 cts. on 100 "	1,547 36
	1879	515,789	30 cts. on 100 "	1,547 36
5 Harper's Ferry district.	1873	159,520	40 cts. on 100 "	638 08
	1874	159,520	40 cts. on 100 "	638 08
	1875	159,520	50 cts. on 100 "	797 60
	1876	159,520	55 cts. on 100 "	877 36
	1877	159,520	50 cts. on 100 "	797 60
	1878	83,435	50 cts. on 100 "	417 17
	1879	83,435	50 cts. on 100 "	417 17
Bolivar district	1873	71,428	30 cts. on 100 "	214 28
	1874	71,428	35 cts. on 100 "	249 99
	1875	71,428	55 cts. on 100 "	392 85
	1876	71,428	50 cts. on 100 "	357 14
	1877	106,190	50 cts. on 100 "	530 95
	1878	106,190	50 cts. on 100 "	530 95
	1879	106,190	50 cts. on 100 "	530 95
Shepherd district	1873	71,428	15 cts. on 100 "	107 14
	1874	71,428	12 cts. on 100 "	85 71
	1875	71,428	14 cts. on 100 "	99 99
	1876	71,428	16 cts. on 100 "	114 28
	1877	75,850	20 cts. on 100 "	151 70
	1878	75,850	20 cts. on 100 "	151 70
	1879	75,850	20 cts. on 100 "	151 70
			Forward	$21,973 74
6			Brought forward	21,973 74
Charlestown district.	1873	71,428	30 cts. on 100 dollars	214 28
	1874	71,428	9 cts. on 100 "	64 28
	1875	71,428	22 cts. on 100 "	157 14
	1876	71,428	22 cts. on 100 "	157 14
	1877	68,265	16 cts. on 100 "	109 22
	1878	68,265	16 cts. on 100 "	109 22
	1879	68,265	16 cts. on 100 "	109 22
Middleway or Averill district.	1873	71,428	18½ cts. on 100 "	132 12
	1874	71,428	10 cts. on 100 dollars	71 42
	1875	71,428	28¼ cts. on 100 "	201 78
	1876	71,428	19½ cts. on 100 "	139 28
	1877	53,095	18 cts. on 100 "	95 57
	1878	53,095	18 cts. on 100 "	95 57
	1879	53,095	18 cts. on 100 "	95 57

Exhibit "A" of Bill—Continued.

	Year.	Valuation.	Rate of levy.	Amount of tax due.
Kabletown or Osborne district.	1873	71,428	23 cts. on 100 dollars	164 28
	1874	71,428	18 cts. on 100 "	128 57
	1875	71,428	17 cts. on 100 "	121 42
	1876	71,428	17 cts. on 100 "	121 42
	1877	75,850	16 cts. on 100 "	121 36
	1878	75,850	16 cts. on 100 "	121 36
	1879	75,850	16 cts. on 100 "	121 36
	1873	71,428	12 cts. on 100 "	85 71
	1874	71,428	12 cts. on 100 "	85 71
	1875	71,428	17 cts. on 100 "	121 42
	1876	71,428	16 cts. on 100 "	114 28
	1877	53,095	17½ on 100 "	92 91
	1878	53,095	17½ on 100 "	92 91
	1879	53,095	17½ on 100 "	92 91
				$25,311 17

7 And at another day, to wit, at rules held for the said court, at the court-house thereof, on the first Monday in August, 1885, the defendant still failing to appear, the decree *nisi* awarded against it at last rules was confirmed and the cause set for hearing.

And at another day, to wit, at a circuit court held for the county of Ohio, at the court-house thereof, on the 10th day of October, 1885.

STATE OF WEST VIRGINIA
vs.
BALTIMORE AND OHIO RAILROAD COMPANY. } In Chancery.

This day came the Baltimore and Ohio Railroad Company and filed its demurrer, in writing, to the plaintiff's bill of complaint, in which demurrer the plaintiff joins.

Thereupon the defendant filed its petition for the removal of this case to the circuit court of the United States for the district of West Virginia, and with the petition filed two bonds, in each of which R. T. Devries is surety, one of which is payable to the State of West Virginia, for the use, &c., and the other of which is payable to the county of Jefferson and the several boards of education therein named, and the surety in the said bonds is now by the court approved as sufficient.

And the defendant moved the court to remove this cause as prayed for in said petition, which motion is argued by counsel and overruled by the court, and the prayer of said petition is refused.

8 *Demurrer to Bill.*

In the Circuit Court for Ohio County, West Virginia.

STATE OF WEST VIRGINIA
vs.
BALTIMORE AND OHIO RAILROAD COMPANY. } In Chancery.

The demurrer of the defendant to the bill of complaint exhibited against it by the State of West Virginia.

For causes of demurrer this defendant says—

1st. This court has no jurisdiction under the law to entertain the said bill, and especially so much thereof as seeks to assert a lien upon real property situated in the county of Jefferson.

2nd. The State of West Virginia has no right to sue for the county and district taxes mentioned in the said bill.

3. The attorneys whose names are signed to the said bill have no authority to use the name of the State, nor to represent the State in this matter.

4. There is no equity in the said bill.

Petition for Removal.

In the Circuit Court of Ohio County, State of West Virginia.

THE STATE OF WEST VIRGINIA
vs.
BALTIMORE AND OHIO RAILROAD COMPANY.

9 Petition for removal into the circuit court of the United States for the district of West Virginia.

Your petitioner, The Baltimore and Ohio Railroad Company, respectfully represents that the matter in dispute in the above-entitled cause exceeds, exclusive of costs, the sum or value of five hundred dollars; that the said cause is a suit of a civil nature between the County of Jefferson, West Virginia; the Board of Education of Bolivar District of Jefferson County, the Board of Education of Harper's Ferry District of Jefferson County, the Board of Education of Shepherd District of Jefferson County, the Board of Education of Charlestown District of Jefferson County, the Board of Education of Middleway or Averill District of Jefferson County, the Board of Education of Kabletown or Osborne District of Jefferson County, and the Board of Education of Potomac District of Jefferson County, and the said Baltimore and Ohio Railroad Company, brought by the said county of Jefferson and the said seven boards of education of the said several districts of Jefferson county hereinabove named, for their own exclusive use and benefit, in the name of the State of West Virginia, as plaintiff, against the said Balti-

more and Ohio Railroad Company, a body politic duly incorporated by the laws of the State of Maryland, and which was at the time of the institution of this suit and is now such corporation and citizen of the said last-named State; that the said county of Jefferson and the aforesaid seven boards of education of the said several districts of Jefferson county are several municipal corporations created by the laws of the State of West Virginia, and each one of them was at the time of the institution of this suit and now is such corporation and citizen of the State of West Virginia.

Your petitioner has made and herewith filed a bond, with
10 good and sufficient surety, for its entering into the said circuit court of the United States for the said district of West Virginia, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that this suit shall have been wrongfully or improperly removed thereto, and prays that this honorable court will accept this petition and bond, herewith filed, and make an order to proceed no further in said suit; and it will ever pray, &c.

C. BOGGESS & H. M. RUSSELL,
Att'ys for Defendant.

STATE OF MARYLAND, *City of Baltimore,* } *To wit:*

Robert Garrett, being duly sworn, says that he is president of the Baltimore and Ohio Railroad Company, and that the statements and allegations contained in the foregoing petition are true to the best of his knowledge, information, and belief.

ROBERT GARRETT.

Subscribed and sworn to before me, a justice of the peace of the State of Maryland in and for the city of Baltimore, this 29th day of September, 1885.

ROBERT A. THURSBY, *J. P.*

STATE OF MARYLAND, *Baltimore City,* } *sct:*

I hereby certify that Robert A. Thursby, Esquire, before whom the annexed affidavit was made and who has thereto subscribed his name, was at the time of so doing a justice of the peace of the State of Maryland in and for the city of Baltimore, duly commissioned and sworn and authorized to administer oaths and take acknowledgements. I further certify that I am acquainted
11 with the handwriting of the said justice and verily believe the signature to be his genuine signature.

In testimony whereof I hereto set my hand and affix the seal of the superior court of Baltimore city this 29th day of September, A. D. 1885.

[SEAL.]

JAMES BOND,
Clerk of the Superior Court of Baltimore City.

Bond.

Know all men by these presents that we, The Baltimore and Ohio Railroad Company, as principal, and R. T. Devries —— ——, as sureties, are held and firmly bound unto the County of Jefferson, the Board of Education of Potomac District of the County of Jefferson, the Board of Education of Charlestown District of Jefferson County, the Board of Education of Middleway or Averill District of Jefferson County, the Board of Education of Harper's Ferry District of Jefferson County, the Board of Education of Bolivar District of Jefferson County, the Board of Education of Shepherd District of Jefferson County, and the Board of Education of Kabletown or Osborne District of Jefferson County in the penal sum of two hundred and fifty dollars, the payment whereof, well and truly, to be made to them, their successors and assigns, and we bind ourselves and our successors, jointly and severally, firmly by these presents.

The condition of the above obligation is such that whereas the said Baltimore and Ohio Railroad Company has filed its petition in the circuit court of Ohio county, State of West Virginia, asking for the removal into the circuit court of the United States in and for the district of West Virginia of a certain cause wherein the
12 said county of Jefferson and the said hereinbefore-named seven boards of education of the said several districts of Jefferson county, for their own exclusive use and benefit, have sued in the name of the State of West Virginia as plaintiff and the said Baltimore and Ohio Railroad Company is defendant: Now, if the said Baltimore and Ohio Railroad Company shall enter into the said circuit court of the United States for the district of West Virginia, on the first day of its next session, a copy of the record of the said suit and shall well and truly pay all costs that may be awarded by the said circuit court of the United States if said court shall hold that said suit was improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

Witness the said corporate name of the said Baltimore and Ohio Railroad Company by Robert Garrett, its president, and the names and seals of R. T. Devries (seal) this 29th day of September, 1885.

Attest:

[SEAL.] W. H. IJAMS, *Secretary.*

R. T. DEVRIES. [SEAL.]

Signed, sealed, and acknowledged, and security sworn as to sufficiency, and approved by me, in my office, this 5th day of October, 1885.

JNO. W. MITCHELL, *Clerk.*

13 *Bond.*

Know all men by these presents that we, The Baltimore and Ohio Railroad Company, as principal, and R. T. Devries and —— ——,

as sureties, are held and firmly bound unto the State of West Virginia, for the use of the county of Jefferson; the Board of Education of Potomac District of the County of Jefferson, the Board of Education of Charlestown District of Jefferson County, the Board of Education of Middleway or Averill District of Jefferson County, the Board of Education of Harper's Ferry District of Jefferson County, the Board of Education of Bolivar District of Jefferson County, the Board of Education of Shepherd District of Jefferson County, and the Board of Education of Kabletown or Osborne District of Jefferson County in the penal sum of two hundred and fifty dollars ($250); to the payment whereof, well and truly to be made to it, for the use of them, their successors and assigns, we bind ourselves, our and each of our heirs, successors, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 5th day of October, A. D. 1885.

The condition of the above obligation is such that whereas the said Baltimore and Ohio Railroad Company has filed its petition in the circuit court of Ohio county, State of West Virginia, asking for the removal into the circuit court of the United States for the district of West Virginia of a certain cause wherein the State of West Virginia, for the use of the said county of Jefferson and the said hereinabove-named several boards of education of the
14 said several districts of Jefferson county, has sued as plaintiff and the said Baltimore and Ohio Railroad Company is defendant: Now, if the said Baltimore and Ohio Railroad Company shall enter into the said circuit court of the United States for the district of West Virginia, on the first day of its next session, a copy of the record of said suit and shall well and truly pay all costs that may be awarded by the said circuit court of the United States if said court shall hold that said suit was improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By ROBERT GARRETT, [SEAL.]
Its President.

Attest:
[SEAL.] W. H. IJAMS, *Secretary.*

R. T. DEVRIES. [SEAL.]

Signed, sealed, and acknowledged, and security sworn as to sufficiency, and approved by me in my office this 5th day of October, 1885.

JNO. W. MITCHELL, *Clerk.*

STATE OF WEST VIRGINIA, *Ohio County,* } *sct:*

I, John W. Mitchell, clerk of the circuit court of said county and State, certify the foregoing to be a full, true, and complete transcript

of the papers filed and orders entered in the suit in equity pending in said court, wherein The State of West Virginia is complainant and The Baltimore and Ohio Railroad Company is defendant, up to and including the date of this certificate.

Given under my hand and the seal of said court this 12th day of October, 1885.

[SEAL.] JOHN W. MITCHELL, *Clerk.*

15 And on another day, to wit, on the 11th day of February, 1886, the following order was made and entered of record, to wit:

THE STATE OF WEST VIRGINIA
vs.
BALTIMORE AND OHIO RAILROAD COMPANY. } In Chancery.

This day came the parties, by their attorneys, and thereupon the plaintiff moved the court to dismiss this cause as improvidently removed, and also to remand the same to the circuit court of Ohio county, West Virginia, from which it was removed to this court.

And on another day, to wit, on the 24th day of June, 1886, the following order was made and entered of record, to wit:

THE STATE OF WEST VIRGINIA
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

In equity.

On this 24th day of June, 1886, came the parties, by their attorneys, and the motion heretofore made to remove this cause to the circuit court for Ohio county was argued by counsel and considered, and the court, being of opinion that this suit was not properly removable to this court, doth sustain said motion, and it is ordered that this cause be remanded to the said circuit court for Ohio county, and that the said State of West Virginia recover of the said Baltimore and Ohio Railroad Company its costs in this court expended.

The said Baltimore and Ohio Railroad Company, by its attorneys, considering itself aggrieved by this order remanding this suit as aforesaid, prays that it may be allowed an appeal from said order; which appeal is allowed to said company accordingly, but
16 this allowance of appeal is not to take effect until the said company, or some one for it, execute a bond in the penalty of $250, with good security, conditioned according to law, to be approved by one of the judges of this court and filed according to law.

And on the 18th day of August, A. D. 1886, the following bond was filed in the clerk's office of the circuit court of the United States for the district of West Virginia:

Bond.

Know all men by these presents that we, The Baltimore and Ohio Railroad Company and John Adair and Chas. H. Shattuck, are held and firmly bound unto the State of West Virginia in the full and just sum of two hundred and fifty dollars, to be paid to the said The State of West Virginia, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 25th day of June, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at a circuit court of the United States for the district of West Virginia, in a suit depending in said court between The State of West Virginia, complainant, and The Baltimore and Ohio Railroad Company, defendant, a decree was rendered against the said defendant, and the said defendant having prosecuted an appeal from said final decree to the Supreme Court of the United States, and having obtained an appeal and having filed a
17 copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, a citation directed to the said State of West Virginia, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said The Baltimore and Ohio Railroad Company shall prosecute its appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

THE BALTIMORE AND OHIO R. R. CO.,
By JOHN ADAIR, *Ag't.* [SEAL.]
JOHN ADAIR. [SEAL.]
C. H. SHATTUCK. [SEAL.]

Approved by—

J. J. JACKSON,
U. S. Dist. Judge.

Aug. 16, 1886.

18 And on another day, to wit, on the 16th day of August, 1886, a citation was issued from the clerk's office of the circuit court of the United States for the district of West Virginia; which citation, with the return thereon, is in words and figures following, to wit:

Citation.

The United States of America to the State of West Virginia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of West Virginia, wherein The Baltimore and Ohio Railroad Company is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice [SEAL.] of the United States, this 16th day of August, in the year of our Lord one thousand eight hundred and eighty-six.

L. B. DELLICKER,
Clerk Circuit Court U. S., D. W. Va.

The "return" thereon is in words and figures following, to wit:

Return.

Served a true copy of the within monition upon E. W.
19 Wilson, one of the appellees in case wherein Baltimore and Ohio R. R. is appellant, by serving the same personally upon said appellee, on the 23rd day of August, 1886, at Charleston, W. Va.

C. SEHON,
U. S. Marshal, Dist. of W. Va.
J. H. VAN BUREN, *Dep. M.*

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do certify that the foregoing is a true copy from the records and papers of my office of the record in the case of The State of West Virginia against The Baltimore and Ohio Railroad Company, lately pending in this court.

Seal Circuit Court United States, District West Virginia, Parkersburg, West Va.

In testimony whereof I hereunto set my hand and the seal of said court, at Parkersburg, in said district, this 6th day of September, 1886.

L. B. DELLICKER,
Clerk Circuit Court U. S., D. W. Va.

Endorsed on cover: West Virginia C. C. U. S. No. 182. The Baltimore & Ohio Railroad Company, appellant, *vs.* The State of West Virginia. Filed October 15, 1886.

FILED
DEC 17 1889
JAMES H. McKENNEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1889.—No. 182.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
APPELLANT,

vs.

THE STATE OF WEST VIRGINIA.

Appeal from the Circuit Court of the United States for the District of West Virginia.

BRIEF OF BEHALF OF THE APPELLANT.

JOHN K. COWEN,
HUGH L. BOND, JR.,
Counsel for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1889.—No. 182.

THE BALTIMORE AND OHIO RAILROAD COMPANY, APPELLANT,

vs.

THE STATE OF WEST VIRGINIA.

Appeal from the Circuit Court of the United States for the District of West Virginia.

BRIEF OF BEHALF OF THE APPELLANT.

This is a suit in equity, brought April 30, 1885, in the Circuit Court of Ohio County, West Virginia, in the name of the State of West Virginia against the Appellant, to collect certain taxes alleged to be due the County of Jefferson and certain school districts in said County, on the ground that the taxes constituted liens on the real estate of the appellant. The character of the suit and the relief sought will fully appear by reference to the bill of complaint and complainant's exhibit A. (Pages 1, 2, 3 & 4 of the Record.)

On the tenth day of October, 1885, the appellant filed its petition for removal of the suit into the Circuit Court of the United States for the District of West Virginia, which will be found on page five of the Record. This petition was accompanied by two bonds, one given directly to the

County of Jefferson and the several school districts therein as obligees, the other given to the State of West Virginia for the use of the County of Jefferson and of the several school districts therein. As will appear by the petition and bonds, the ground for the removal was that the suit was on the face of the bill brought by or for the use of the County of Jefferson and the several school districts therein. The State of West Virginia was merely the nominal plaintiff without any real interest in the result, the only controversy being between the municipal corporations named in the Bill of Complaint and the defendant railroad company. The Circuit Court of the United States remanded the cause to the State Court, on the ground that it was not removable, because the State of West Virginia was a party. The Railroad Company appealed, but the bond required in the allowance of appeal was given only to the State of West Virginia. (Page 10 of the Record).

The return on the citation (Page 11 of Record) is as follows: "Served a true copy of the within monition upon E. W. Wilson, one of the appellees in case wherein Baltimore and Ohio R. R. is appellant, by serving same personally upon said appellee, on the 23d day of August, 1886, at Charleston, W. Va.

C. SEHON, *U. S. Marshal, Dist. of W. Va.*
J. H. VAN BUREN, *Dep. M.*

Mr. D. B. Lucas has, we understand, entered a general appearance in this case for the State. The entry of his appearance waives the informalities of the service of the citation so far as to bring the State of West Virginia into this Court, provided Mr. Lucas has authority to represent the State of West Virginia.

It would seem, however, that the only party appellee that we have in this Court, is the State of West Virginia, there being no service of citation upon the County of Jefferson or any of the school districts, and no appearance entered for any of them. Under these circumstances, the

counsel for the Appellant do not feel able to maintain this appeal, since whatever the case may have been in the Circuit Court, in this Court only the State of West Virginia and the Appellant are parties. We shall, therefore, ask leave to dismiss the appeal in open Court.

JOHN K. COWEN,
HUGH L. BOND, JR.,
Counsel for Appellant.

THE BALTIMORE AND OHIO RAILROAD CO.,
APPELLANT,

VS.

THE STATE OF WEST VIRGINIA.
APPELLEE.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1889.

BRIEF FOR APPELLEE,

By DANIEL B. LUCAS.

WITH AN APPENDIX,

CONTAINING THE ORIGINAL CHARTER OF THE BALTIMORE AND OHIO RAILROAD COMPANY, THE LAWS IN MARYLAND, VIRGINIA AND WEST VIRGINIA, AND EXTRACTS FROM THE GENERAL RAILROAD LAW.

REGISTER PRINT, WHEELING, W. VA.

THE BALTIMORE AND OHIO RAILROAD CO.,
APPELLANT,
VS.
THE STATE OF WEST VIRGINIA,
APPELLEE.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1889.

BRIEF FOR APPELLEE,

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CONTENTS.

Argument 4
Charter of B. & O. R. R. Co..... 21
Laws in Maryland..... 21
Laws in Virginia..... 30
Laws in West Virginia..... 43
Joint Resolution..... 44
Adoption of Virginia Act..... 45
Certificate of Secretary of State..... 46

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BRIEF FOR APPELLEE.

The State of West Virginia instituted this suit at the seat of Government, in the Circuit Court of Ohio county, by filing her bill in Chancery, at the July Rules, 1885. For the purpose of enforcing payment to her of certain delinquent taxes. At August Rules, the defendant failing to appear, the decree *nisi* was confirmed, and the cause set for hearing. At the ensuing term, on October 10th, the defendant appeared, and filed its demurrer to the plaintiff's bill, in which the plaintiff joined. Thereupon, the defendant, filed its petition for the removal of the cause to the Circuit Court of the United States for the District of West Virginia, and with its petition, filed two bonds, one payable directly to the county of Jefferson, and the several districts therein in which the delinquent taxes had been assessed, and the other payable to the State for the use of the county, and

such districts, with satisfactory security upon each bond. The State Court, however, refused to remove the cause; and thereupon, it was removed to the Circuit Court of the United States by an order of the latter court, directing it to be docketed therein on presentation of an authentic copy of the record, on the 14th day of January, 1886. (See Rec. p. 1.) On the 11th day of February following, (1886), the plaintiff moved the United States Circuit Court to dismiss the cause as improvidently removed, and also to remand the same to the Circuit Court of Ohio county, whence it was removed; and at the next term, on the 24th day of June, 1886, the United States Circuit Court, (Chief Justice Waite presiding), sustained the motion, and ordered the cause to be remanded. From this order, the defendant appealed, and the cause was docketed in this, the Supreme Court of the United States, on the 15th of October, 1886.

ARGUMENT.

I do not perceive that there can be considered, on this appeal, any other question than the propriety of the order dismissing the cause from the Circuit Court of the United States, and remanding it to the State Court.

That order was proper for two reasons:

I. This was a suit by a State, and not by a citizen. In the case of *Memphis and C. Railroad* v. *Alabama*, 107 U. S. 581, this Court concludes its opinion on page 585, as follows: "This view being conclusive against the claim of the plaintiff in error, it is unnecessary to consider whether the action brought by the State of Alabama *for the use of one of its counties*, can be considered as a suit brought by a citizen of the State of Alabama, within the meaning of the Constitution and laws of the United States." The question here propounded by the Court, does not arise in our case, because this is a bill in chancery, in which there can be no demand by one party "*for the use*" of another. The real party in interest must bring the suit, and all parties in interest must be made parties plaintiffs or defendants. In the case of *Baker's adm'r.* v. *Hopkins &c.*, 2 Patton & H. R. 110, the Court of Appeals of Virginia so decided; and in the case of *McClaskey* v. *O'Brien*, 16 W. Va., 794, the Court of Appeals of West Virginia confirmed and insisted upon this principle in the following language: "H. brings suit in equity in his own

name for the use and benefit of L., and does not make L. a party: *Held*, that while this mode of proceeding, for well known reasons, will be all right in an action at law, in a class of cases at least, *it is not allowed in equity*, &c." The defect is one reached by demurrer, if it appears by the bill; otherwise, it is a matter of substantive defence, to be taken advantage of by plea or answer. In this case, the defect, if such there be, does not appear on the face of the bill which alleges, (Rec. p. 2), that the taxes sued for "*Ought to have been paid by the defendant into the treasury of the State.*" If this allegation be untrue, it is a matter of traverse and evidence, on the tender and production of which, the plaintiff would go out of court. *This suit, therefore, whether rightfully or wrongfully brought, is actually a suit by the State herself and not by a citizen, and hence is not removable on the ground of citizenship.* The County Courts and Boards of School Districts of West Virginia are all made by law, (see W's. Amend. Code, pp. 275 and 359), corporations, capable of suing and being sued, and when they appear in Court as litigants, it will be time enough to decide whether a suit so brought for taxes is removable. The present suit is brought by the State alone, in her sovereign capacity, to recover taxes which she avers *ought to have been paid into her own treasury. Stone* v. *South Carolina*, 117 U. S. 430. *Cunningham* v. *Macon & B. R. R. Co.*, 109 U. S. 457. *Insurance Co.* v. *Wisconsin*, 119 U. S. 430 *Rev. Stats. U. S.*, Sec. 639, par. 1. The collection of taxes is an act of sovereignty; a suit for such collection is, therefore, a suit in the State's sovran capacity. *Blackw. on Tax Titles*, pp. 1 and 2. 1. *Desty on Taxation*, p. 2. *Burroughs on Taxation*, Sec. 6.

II. But were it otherwise, the Baltimore and Ohio Railroad Company is a domestic corporation, and hence, (using the term in its conventional sense with reference to the jurisdiction of the Circuit Court of the United States), a "citizen" of West Virginia. The bill stated (Rec. p. 2.) that "*the defendant is a corporation of the State of West Virginia,*" and the defendant by its demurrer (Rec. p. 6.) admitted this allegation to be true. Upon this state of the pleadings, it was incumbent on the defendant to offer some evidence showing its right to remove, and in the absence of such evidence, the Court ought to have remanded. As the case was presented to the Circuit Court on the pleadins, there was no right of removal. *Carson* v. *Dunham*, 121 U.

S. 421. But the Circuit Court of the United States was perhaps bound so take judicial cognizance of the laws granting and amending the charters of the defendant, as public laws of the State. In the courts of the State, this view has prevailed. *Hart* v. *B. & O. R. R. Co.*, 6 W. Va. 336. *State* v. *B. & O. R. R. Co.*, 25 ib. 329. If defendant refuse to concede this, it has no case, because, as we have seen, it has admitted, in the pleading that it was a West Virginia corporation. If on the other hand, it make this concession, we gladly avail ourselves of it, and would ask this Court to decide the question (of vital importance to West Virginia), the decision of which by this tribunal the defendant has been evading for a quarter of a century, namely, *Is the Baltimore and Ohio Railroad Company, as to its franchises and operations in West Virginia, a "citizen" of that State, and as such incapacitated to remove a case instituted in her courts by another citizen thereof?*

If this Court can see its way to decide this question, once for all, it will confer a lasting benefit upon the citizens of a State, three hundred miles of whose territory is traversed by one of the most gigantic railroad corporations of modern times.

At common law, it is said, a corporation could be a citizen of but one State: by the same law, the accident of birth determined the citizenship of a natural person, and the maxim "once a citizen always a citizen" determined allegiance from the cradle to the grave. 2 *Kent's Com.* 42, 49. 1 *Blacks. Coms.* 366, and note 1, also 36, 369–70, and note (5). This rule of common law is now abrogated as to natural persons; and as to artificial persons, whatever the common law may have been, this Court has decided that a corporation created by the laws of one State may duplicate itself by being rechartered in a sister State, and thus become two corporations of the same name and organization, with coequal powers and capacities. This doctrine of recharter was promulgated and defined by this court, in the case of *Ohio and Memphis R. R. Co.* v. *Wheeler*, 1 *Black.* 286. In that case, the court said, (on page 297,): "It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the States of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the States as one corporate body, exercising the same powers and fulfill-

ing the same duties in both States. Yet it has no legal existence, in either State except by the law of the State. And neither State could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may indeed be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the State or sovranty which brings it into life, and indues it with its faculties and powers. The president and the directors of the Ohio and Mississippi Railroad Company is, therefore, a distinct and separate corporate body in Indian, from the corporate body of the same name in Ohio, and they cannot be joined in a suit as the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a Circuit Court of the United States." *Railway Company* v. *Witton*, 13 Wall, 270. This doctrine of recharter received further elucidation in the case of the *Memphis and Charleston R. R. Co.* v. *Alabama*, 107 U. S. 581. The sylabus of that case is as follows: "The Memphis and Charleston Railroad Company is made by the statutes of Alabama an Alabama corporation; and although previously incorporated in Tennessee also, cannot remove into the Circuit Court of the United States a suit brought against it in Alabama by a citizen of Alabama." It will be perceived that the doctrine that a corporation must be regarded, by conclusive presumption of law as a "citizen" of that State only, where *first* incorporated, is here entirely discarded: and it is held, that while a corportion may not, indeed, be a "citizen" of more than one State, yet the same organization, organized by virtue of original charter from one State, may constitute itself an independent corporation in another State, by virtue of being rechartered therein; and such independent corporation will be regarded as a domestic corporation of the State where so rechartered.

This principle, recognized by, if not originating in this Court, is thus commented on by Mr. Morawetz, in his admirable work on Private Corporations: "It has been stated in a previous section, that, in construing the constitutional provisions and acts of Congress conferring jurisdiction upon the Circuit Courts of the United States, a corporation must be treated as a citizen of the State from which its franchises are derived. The fran-

chises which a corporation chartered by several States can exercise in either State must be derived from the laws of that State alone. And it has been decided, for the purpose of determining the jurisdiction of the Circuit Courts, a corporation, chartered by several States, must, within the district of either State, be treated as a citizen of that State alone." *Morawetz on Priv. Corp. Sec.* 530.

It is true that Mr. Morawetz takes the view that there is, after all, but *one* corporation. In sec. 528, he says: "But although each charter of a company incorporated by different States can operate as a grant of franchises only within the jurisdiction of the State enacting it, yet the company itself does not on that account cease to be one company, having one undivided enterprise. A company thus constituted, is in reality but a single corporation, formed by agreement of its members for the purpose of carrying on business in a corporate capacity in several States."

For this position, he cites in a note, among other cases, *The Baltimore and Ohio Railroad Company* v. *Harris*, 12 Wall. 82, a case which we now come to discuss.

On the 28th day of February, 1827, was chartered by the Legislature of the State of Maryland, the Baltimore and Ohio Railroad Company. This was prior to the "Rocket" of Stephenson, and this company was the pioneer in long-distance, steam-railway transportation in the United States, and perhaps in the world. For many years, it struggled against forfeiture for bare existence, and a quarter of a century saw the main stem hardly completed. Its route was eighty-two miles through Maryland, and about three hundred through Virginia. I have attached to this brief an appendix containing the charter of Maryland, the recharter of Virginia, the act of March 6th, 1847, the authoritative acknowledgement on the part of the Company of its acceptance of the amendment to its charter by the act of March 6th, 1847, the general railroad law of Virginia, the statutes of West Virginia of 1872–73 and 1882, bearing on the status of railroad companies doing business in West Virginia, under charters granted or laws passed by Virginia or West Virginia. This compilation will render it unnecessary for me to encumber the body of this argument by lengthy extracts from these various laws.

In the case of *The Railroad Company* v. *Harris*, there is an apparent variance of view from the principle laid down in the *Ohio and Mississippi Railroad Company* v. *Wheeler*. The Court itself recognized this fact, and said: "So far as there is anything in the language of the Court in the case of the *Ohio and Mississippi Railroad Company* v. *Wheeler*, in conflict with what has been here said, it is intended to be restrained and qualified by this opinion, We will add, however, that as the case appears in the report, we think the judgment of the Court was correctly given. It was the case of an Indiana railroad company licensed by Ohio, suing a citizen of Indiana in the Federal Court of that State."

The variance between the two cases is, however, one of theory rather than of practical results. The conclusion in both cases is the same, and it is against the right of removal. In the earlier case, (*Railroad Company* v. *Wheeler*), it was held that the Company could not remove, because it was a citizen of Indiana where it was first chartered; and the intimation was, as we have seen, that there were two independent corporations, one in Indiana, the other in Ohio. On the other hand, in the later case, *Railroad Company* v. *Harris*, the other view is taken, (that which Mr. Morawetz adopts), that the corporation is one, but, nevertheless, it is a "citizen" of both States. In the first case, the right of removal was negatived by the view that the recharter created a distinct corporation, domestic as to the State where rechartered; in the second case, it was held the license to operate in the second State included in its terms amenability to the Courts of the State granting such license. Hence in this case, (*Railroad* v. *Harris*), on page 83, the Court says: "In the *Baltimore and Ohio Railroad Company* v. *Gallahue's Administrator*, 12 Grattan, 658, it was held by the Court of Appeals of Virginia that the company was suable in that State. *In this we concur. We think this condition is clearly implied in the license, and that the company, by constructing its road there, assented to it.* The authority of that case was recognized by the Court of Appeals of West Virginia, in *Goshorn* v. *The Supervisors*, (1 W. Va. 308) and *Railroad Company* v. *Supervisors*, (3 Ib. 319)." After such an unequivocal expression of this Court, it is almost inconceivable how legal ingenuity could have distorted this case into an authority in favor of removal, on the part of the Baltimore and

Ohio Railroad Company. How little importance this Court attached to the theoretical variance of view between the case in 1st Black, (*Railroad* v. *Wheeler*), and that in 12th Wallace (*Railroad* v. *Harris*), is shown by the subsequent case of *Railroad Company* v. *Whitton*, 13 Wall. 270.

The syllabus of this case is as follows:

I. Although a corporation, being an artificial body created by legislative power, is not a citizen, within several provisions of the Constitution; yet where rights of action are to be enforced by or against a corporation, it will be considered as a citizen of the State where it was created, within the clause extending the judicial power of the United States to controversies between the citizens of different States.

II. Where a corporation is created by the laws of a State, it is, in suits brought in a Federal court in that State, to be considered as a citizen of such State, whatever its status or citizenship may be elsewhere by the legislation of other States.

Justice Field, in delivering the opinion of the court, said, on pp. 283–85:

"In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen of Wisconsin by the laws of that State. It is not there a corporation or a citizen of any other State. Being there sued, it can only be brought into court as a citizen of that State, whatever its status or citizenship may be elsewhere. Nor is there anything against this view, but, on the contrary, much to support it, in the case of *The Ohio and Mississippi Railroad Company* v. *Wheeler*. In that case the declaration averred that the plaintiffs were a corporation created by the laws of the States of Indiana and Ohio, and that the defendant was a citizen of Indiana, and the court, after referring to previous decisions, said that it must be regarded as settled that a suit by or against a corporation in its corporate name is a suit by or against citizens of the State which created it, and therefore that case must be treated as a suit in which citizens of Ohio and Indiana were joined as plaintiffs against citizens of the latter State, and of course could not be maintained in a court of the United States, where jurisdiction of the case depended upon the citizenship of the parties."

Again:

"The correctness of this view is also confirmed by the recent

decision of this court in the case of *The Railroad Company* v. *Harris*. In that case a Maryland railroad corporation was empowered by the Legislature of Virginia to construct its road through that State, and by an act of Congress to extend a lateral road into the District of Columbia."

"And this court held that these acts did not create a new corporation either in Virginia or the District of Columbia, but only enabled the Maryland corporation to exercise its faculties in that State and District. They did not alter the citizenship of the corporation in Maryland, but only enlarged the sphere of its operations *and made it subject to suit in Virginia and in the District*. The corporation, said the court, can not migrate, but may exercise its authority in foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there, it will be presumed to have assented, and will be bound accordingly. For the purposes of Federal jurisdiction, it is regarded as if it were a citizen of the State where it was created, and no averment or proof as to the citizenship of its members elsewhere will be permitted."

It is hence perceived what a waste of time it would be to discuss the question whether the act of March 8th, 1827, and the supplemental and amendatory act of March 6th, 1847, created a new corporation, or whether they licensed an existing corporation, in *terms which implied that it should consent to be sued in Virginia, which condition the company, by building the road, and also by express acknowledgment in writing, assented to.*

In either view, there is no right of removal.

The act of March 8th, 1827, re-enacts the Maryland charter *in totidem verbis*, and grants to the company the same franchises, subject to the same limitations and conditions, as are granted in Maryland by the Maryland act; and the same rights, privileges and immunities which are reserved to the State of Maryland, or to the citizens thereof, are reserved to the State of Virginia and her citizens.

Among the privileges granted by the second section of the Maryland Act, was "*to sue and be sued*"—in Maryland. The same privilege is granted in Virginia—*to sue and be sued there*. This, certainly, rendered the company suable in Virginia, and suable in her own courts. This is only one example, and by no

means the strongest, of the provisions of the Maryland law, which rendered the company a "citizen"—(that is, amenable to the courts)—of that State, and which, when re-enacted by Virginia, must have had a similar efficacy to establish the "citizenship" of the company in Virginia, as to its operations within her territory.

But lest there should be some doubt upon this subject, when the company failed to complete its road within the ten years specified in the charter, the Legislature of Virginia amended and supplemented the original act by several others. One of these, that of March 6th, 1847, (see Appendix) *the Railroad Company has accepted*, as appears by its letter to the Attorney-General of West Virginia, dated June 21st, 1871, (see App.) and said act is a part of the contract by which it does business in West Virginia. The sixth section of this act provided, "That said company shall be subject to the provisions of the act of assembly passed on the 11th day of March, 1837, establishing general regulations for the incorporation of railroad companies, with respect to that portion of their road or other improvements now or hereafter to be constructed within this commonwealth, so far as the same are properly applicable."

I have copied in the Appendix such portions of this general railroad law as appear to be properly applicable. (See Appendix p. —.) The first section provides, "That whenever it shall be deemed necessary by the General Assembly to grant a charter for the incorporation of a company to construct a railroad, the following general provisions shall be deemed and taken to be a part of the said charter or act of incorporation, to the same effect as if the same were expressly re-enacted, in reference to any such charter or act, except so far as such charter or act may otherwise expressly provide."

Among the provisions embodied in the act is one, (sec. 9), conferring the power to exercise eminent domain; and in sec. 20, that in case of the abandonment of the road by the company, the charter shall be annulled, and the State may take possession of the road, otherwise the lands shall revert to the original owners; by sec. 21, penalties are imposed for failure to transport, or exacting illegal tolls, which may be recovered by the injured party by motion in the *county or corporation court*, or *superior court of law for the county or corporation in which such*

preference has been given; sec. 27 provides for regular reports by the company to the Board of Public Works of the State; sec. 35 provides that the charter may be amended or modified by any future Legislature, provided vested rights shall not be taken away or impaired. This general railroad law was accepted by the company, as we have seen, and such assent certainly rendered it a domestic corporation in the territory of West Virginia.

The effect of requiring a railroad company to become "*subject to the general laws of the State*" which licenses its extension into her territory, was passed upon by this court in *Clark* v. *Barnard*, 108 U. S. 436.

The Legislature of Rhode Island authorized a railroad in Connecticut to purchase another road created under the laws of both States; and subsequently the same Legislature authorized the purchasing road to extend, within the limits of Rhode Island, the road thus acquired. The 8th section of this enabling act was as follows: "Said railroad, when the same shall have been constructed, shall be managed and protected in all respects according to the provisions of, and subject to, an act entitled an act to incorporate the Providence and Plainfield Railroad Company, *and the general laws of the State.*" In commenting upon the effect of this enabling statute, this court said: "If it, [the purchasing railroad], had had no previous existence as a corporation under the laws of Rhode Island, it would have become such by virtue of the act in question. For although as a Connecticut corporation, it may have had no capacity to act or exist in Rhode Island for these purposes, and no capacity by virtue of its Connecticut charter, to accept and exercise any franchises not contemplated by it, yet the natural persons, who were corporators, might as well be a corporation in Rhode Island as in Connecticut; and, by accepting charters from both States, could well become a corporate body, by the same name and acting through the same organization, officers and agencies, in each, with such faculties in the two jurisdictions as they might severally confer. The same association of natural persons would thus be constituted into two distinct corporate entities in the two States, acting in each according to the powers locally bestowed, as distinctly as though they had nothing in common either as to name, capital or membership. Such

was in fact the case in regard to this company, so that in Rhode Island it was exclusively a corporation of the state, subject to its laws, and competent to do within its territory whatever its legislation might authorize."

The distinction already established by this court between the recharter of a railroad by, and a mere license to traverse the territory of a state, will be still further illustrated by comparing the views expressed in *Stone* v. *Farmer's Loan and Trust Company*, 116 U. S., 307, with those given in a later case, in 118th, U. S., which I shall place in juxtaposition. In the former case, the court said, (page 333 :).

"There can be no doubt that each of the states through which the Mississippi & Ohio Railroad passes incorporated the company for the purpose of constructing a railroad from Mobile through Alabama, Mississippi, Tennessee and Kentucky, to some point near the Ohio river where it would connect with another railroad to the Lakes, and thus form a continuous line of interstate communication between the Gulf of Mexico on the south, and the Great Lakes on the north. It is equally certain that Congress aided in the construction of parts of this line of road, so as to establish such a route of travel and transportation. But it is none the less true that the corporation created by each state is for all the purposes of local government a *domestic corporation*, and that its road within the state is a matter of domestic concern."

In confirmation of, or contrast with the law as thus laid down, I will here give an extract of opinion of the court, in *Penn'a Co.* v. *St. Louis, Alton, &c. Railroad*, 118 U. S. Reports, pages 295–6.

"It does not seem to admit of question that a corporation of one state, owning property and doing business in another state by permission of the latter, does not thereby become a citizen of this state also. And so a corporation of Illinois, authorized by its laws to build a railroad across the state from the Mississippi river to its eastern boundary, may by permission of the State of Indiana, extend its road a few miles within the limits of the latter, or, indeed, through the entire state, and may use and operate the line as one road by the permission of the state, without thereby becoming a corporation or a citizen of the State of Indiana. Nor does it seem to us that an act of the leg-

islature conferring upon this corporation of Illinois, by its Illinois corporate name, such powers to enable it to use and control that part of the road within the State of Indiana, as have been conferred on it by the state which created it, constitutes it a corporation of Indiana. It may not be easy in all such cases to distinguish between the purpose to create a new corporation which shall owe its existence to the law or statute under consideration, and the intent to enable the corporation already in existence under laws of another state, to exercise its functions in the state where it is so received. The latter class of laws are common in authorizing insurance companies, banking companies and others to do business in other states than those which have chartered them. To make such a company a corporation of another state, the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state, or by the legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this, and does not make it a citizen of the state conferring such powers."

In a case where the corporation already exists, even if adopted by the law of another state and invested with full corporate powers, it does not thereby become such new corporation of another state, until it does some act which signifies its acceptance of this legislation and its purpose to be governed by it.

Whether there is any conflict of principle in the two views here placed in juxtaposition, is not important for us to inquire, since with regard to the case now before the court, as we have seen, it is certainly governed by one or the other of these principles, and to us it is quite immaterial under which it may be classified. Whether we regard the Baltimore and Ohio Railroad Company as rechartered by Virginia, or only licensed to traverse her territory, *the legislation we have considered, the building of the road under it, and the authorized accession to its terms, by the company, render the company, for all the purposes of local government, a domestic corporation in West Virginia.*

That state, both by judicial decision and legislative enactment, *has presistently claimed that, within her territory, the company was a domestic corporation.*

P., W. & K. R. R. Co. v. *B. & O. R. R. Co.*, 17 W. Va., 812; *Henen* v. *Same*, *ib.* 881; *Quarrier* v. *Same*, 20 *ib.* 424.

This contention has been confirmed by this court, as a correct interpretation of existing legislation.

Railroad v. *Harris*, 12 Wall. 82–3.

In 1873, West Virginia followed up the then existing legislation by a general act declaring that—

"All railroad companies doing business in this state under charters granted or laws passed by the State of Virginia or this state, are hereby declared to be domestic companies or corporations, and shall be treated as such in all cases."

Acts 1872–73, chap. 227, sec. 16.

Again, in 1882, the following Act was passed:

"Every railroad corporation doing business in this state under the provisions of this section, or under charters granted or laws passed by the State of Virginia or this state, is hereby declared to be, as to its works, property, operations, transactions and business in this state, a domestic corporation, and shall be so held and treated in all suits and legal proceedings which may be commenced or carried on by or against any such railroad corporation, as well as in all other matters relating to such corporation."

Acts 1882, chap. 97, sec. 30, p. 277; Warth's Amend. Code, chap. 54, sec. 30.

This court will rarely interfere with the polity of a state in the interpretation of her own laws, where such interpretation has become a rule of property, and action for a long period.

And where such interpretation has already once received the unqualified confirmation of the co-ordinate and independent judgment of this court, it would indeed be strange if this tribunal should reverse itself, and at the same time overrule those principles of comity which have hitherto governed its action.

Burgess v. *Seligman*, 107 U. S., 20.

Railroad v. *Harris*, 112 Wall., 82–3.

After this discussion, already too far prolonged, I cannot believe it necessary to advert, at any length to the case of *Railroad Co.* v. *Koontz*, 104 U. S., 5, or the case of *Marye, auditor*, v. *B. & O. R. R. Co.*, 127 U. S., 117. At the date of these decisions the Baltimore and Ohio Railroad Company had long ceased to exercise in Virginia any privilege derived from the

Acts of 1827, or 1847, or 1837, or other enabling legislation which we have been considering. Neither did the line of its road at any point lie in the State of Virginia. Its only relation to that state was that of lessor of one or more Virginia railroads. As such, this court held that it did not necessarily become a domestic corporation.

Nothing in these decisions can, by the remotest analogy, affect the question of removal, which we have been considering. Not one foot of this railroad traverses Virginia; whereas over three hundred miles of its highway occupy the territory of West Virginia.

Upon the whole, therefore, we are bound to conclude that the Baltimore and Ohio Railroad Company, so far as its operations within the territory of West Virginia are concerned, is a citizen and domestic corperation of that state, and that the order remanding this cause to the state court was correct, and should be affirmed.

DANIEL B. LUCAS.

APPENDIX.

LAWS IN MARYLAND.

1826.—CHAPTER 123.

(*Passed February* 28, 1827.)

CHARTER.

An Act to incorporate the Baltimore and Ohio Railroad Company.

SECTION 1. *Be it enacted by the General Assembly of Maryland*, That Isaac McKim, Thomas Ellicott, Joseph W. Patterson, John McKim, Jr., William Stewart, Talbot Jones, Roswell L. Colt, George Brown, and Evan Thomas, be, and they are hereby appointed commissioners, under the direction of a majority of whom, subscriptions may be received to the capital stock of the Baltimore and Railroad Company hereby incorporated; and they, or a majority of them, may cause books to be opened at such times and places as they may direct, for the purpose of receiving subscriptions to the capital stock of said company, after having given such notice of the times and places of opening the same as they may deem proper: and that upon the first opening of said books, they shall be kept open for at least ten successive days, from 10 o'clock, A. M., until 2 o'clock, P. M., and if, at the expiration of that period, such a subscription to the capital stock of said company, as is necessary to its incorporation, shall not have been obtained, the said commissioners,

or a majority of them, may cause the said books to be opened, from time to time, after the expiration of the said ten days, for the space of twelve months thereafter, or until the sum necessary to the incorporation of the company shall be subscribed, if sooner subscribed; and if any of the said commissioners shall die, resign, or refuse to act during the continuance of the duties devolved upon them by this act, another may be appointed in his stead, by the remaining commissioners, or a majority of them.

SEC. 2. *And be it enacted*, That the capital stock of the said Baltimore and Ohio Railroad Company shall be three millions of dollars, in shares of one hundred dollars each, of which, ten thousand shares shall be reserved for subscription by the state of Maryland, and five thousand by the city of Baltimore, for the space of twelve months after the passage of this act by the legislature of Maryland: and the remaining fifteen thousand shares may be subscribed for by any other corporation, or by individuals; and that as soon as ten thousand shares of the said capital stock shall be subscribed, the subscribers of the said stock, their successors and assigns shall be, and they are hereby declared to be incorporated into a company by the name of the Baltimore and Ohio Railroad Company, and by that name shall be capable in law of purchasing, holding, selling, leasing and conveying estates, real, personal and mixed, so far as shall be necessary for the purposes hereinafter mentioned, and no farther, and shall have perpetual succession, and by said coporate name may sue and be sued, and may have and use a common seal, which they shall have power to alter or renew at their pleasure, and shall have, enjoy, and may exercise all the powers, rights and privileges which other corporate bodies may lawfully do for the purpose mentioned in this act.

SEC. 3. *And be it enacted*, That if more than fifteen thousand shares shall be subscribed to the capital stock of said company, not reserved to the state of Maryland, or to the city of Baltimore, the said commissioners, or a majority of them, shall reduce the subscription to fifteen thousand shares, by striking off from the largest number of shares in succession, until the subscriptions are reduced to fifteen thousand shares, or all the subscriptions to one share: and if there be still an excess, then

lots shall be drawn by the commissioners, to determine who are to be excluded.

SEC. 4. *And be it enacted*, That upon every such subscription, there shall be paid, at the time of subscribing, to the said commissioners, or to their agents, appointed to receive such subscriptions, the sum of one dollar on every share subscribed, and the residue thereof shall be paid in such instalments, and at such times, as it may be required by the president and directors of said company; *Provided*, That not more than one-third of the subscription be demanded in any one year, from the commencement of the work; nor any payment demanded until at least sixty days public notice of such demand shall have been given by the said president and directors: and if any subscriber shall fail or neglect to pay any instalment, or part of said subscription thus demanded, for the space of sixty days next after the time the same shall be due and payable, the stock on which it is demanded shall be forfeited to the company, and may be sold by said president and directors, for the benefit of the company; but the president and directors may remit any such forfeiture, on such terms as they shall deem proper.

SEC. 5. *And be it enacted*, That if the subscription, herein made necessary to the incorporation of the said company, shall not be obtained within twelve months after the first opening of the subscription books, by the said commissioners, this act and all the subscriptions under it, shall be null and void; and the said commisioners, after discharging the expenses of opening the books, shall return the residue of the money, paid in upon such subscriptions, to the several subscribers in proper proportions to the sums respectively paid in by them.

SEC. 6. *And be it enacted*, That, at the expiration of the ten days for which the books are first opened, if ten thousand shares of said capital stock shall have been subsbribed, or if not, as soon thereafter as the same shall be subscribed, if within one year after the first opening of the books, the said commissioners, or a majority of them, shall call a general meeting of the subscribers, at such time and place as they may appoint, and shall give at least twenty days public notice thereof, and at such meeting the said commissioners shall lay the subscription books before the subscribers, then and there present, and thereupon the said subscribers, or a majority of them, shall elect twelve

directors, by ballot, to manage the affairs of said company, and these twelve directors, or a majority of them, shall have the power of electing a president of said company, either from amongst the directors or others, and of allowing him such compensation for his services as they may deem proper; and that in said election, and on all other occasions wherein a vote of the stockholders of said company is to be taken, each stockholder shall be allowed one vote for every share owned by it, him, or her, and every stockholder may depute any other person to vote and act for it, him, or her, as its, his or her proxy; and the commissioners aforesaid, or any three or more of them, shall be judges of the said first election of directors.

SEC. 7. *And be it enacted*, That to continue the succession of the president and directors of said company, twelve directors shall be chosen annually, on the second Monday of October, in every year, in the city of Baltimore, by the stockholders of said company, and that the state of Maryland, and the city of Baltimore may each appoint one additional director of said company, for every twenty-five hundred shares of stock of said company by them respectively owned at the time of such election, but shall not be permitted to vote upon their stock in the election of the directors by the stockholders in general meeting; and that the directors of said company, or a majority of them, shall have power to appoint judges of all elections, and to elect a president of said company, either from amongst the directors or others, and to allow him such compensation for his services as they may deem proper; and if any vacancy shall occur, by death, resignation, or refusal to act, of any president or director, before the year for which he was elected, has expired, a person to fill such vacant place for the residue of the year may be appointed by the president and directors of said company, or a majority of them; and that the president and directors of the company shall hold and exercise their offices until a new election of president and directors; and that all elections which are by this act, or the by-laws of said company to be made on a particular day, or at a particular time, if not made on such day or at such time, may be made at any time within thirty days thereafter.

SEC. 8. *And be it enacted*, That a general meeting of the stockholders of said company shall be held annually, at the time and

place appointed for the election of the president and directors of said company; that they may be called at any time, during the interval between said annual meetings, by the president and directors, or a majority of them, or by the stockholders owning at least one-fourth of the whole stock subscribed, upon giving thirty days public notice of the time and place of holding the same; and when any such meetings are called by the stockholders, such notice shall specify the particular object of the call; and if at any such called meetings a majority (in value) of the stockholders of said company are not present, in person or by proxy, such meetings shall be adjourned from day to day, without transacting any business, for any time not exceeding three days, and if within said three days, stockholders having a majority (in value) of the stock subscribed, do not thus attend, such meetings shall be dissolved.

SEC. 9. *And be it enacted*, That at the regular annual meetings of the stockholders of said company, it shall be the duty of the president and directors in office for the preceding year to exhibit a clear and distinct statement of the affairs of the company; that at any called meetings of the stockholders a majority of those present may require similar statements from the president and directors, whose duty it shall be to furnish them when thus required; and that at all general meetings of the stockholders, a majority (in value) of all the stockholders in said company may remove from office any president or any of the directors of said company, and may appoint others in their stead.

SEC. 10. *And be it enacted*, That every president and director of said company, before he acts as such, shall swear or affirm, as the case may be, that he will well and truly discharge the duties of his said office to the best of his skill and judgment.

SEC. 11. *And be it enacted*, That if any of the said fifteen thousand shares of the capital stock of the said company, not reserved to the city of Baltimore, or to the State of Maryland, shall remain unsubscribed until the organization of the said company; or, if the shares of said capital stock, hereinbefore reserved to the said state or city, or any part of them, shall not be subscribed by said state or city respectively, during the time for which such stock is reserved for them; in either case, the president and directors of the said company, or a majority of

them, shall have power to open books, and to receive subscriptions to any of the capital stock of said company which may thus remain unsubscribed for, or to sell or dispose of such unsubscribed stock for the benefit of the company, for any sum not under its par value; and the purchasers or subscribers of such stock, shall have all the rights, powers and privileges of original subscribers, and shall be subject to the same regulations.

SEC. 12. *And be it enacted*, That the said president and directors, or a majority of them, may appoint all such officers, engineers, agents or servants whatsoever, as they may deem necessary for the transaction of the business of the company, and may remove any of them at their pleasure; that they, or a majority of them, shall have power to determine by contract the compensation of all the engineers, officers, agents or servants in the employ of said company, and to determine by their by-laws the manner of adjusting and settling all accounts against the company, and also the manner and evidence of transfers of stock in said company: and that they, or a majority of them, shall have power to pass all by-laws, which they may deem necessary or proper for exercising all the powers vested in the company hereby incorporated, and for carrying the objects of this act into effect; *Provided only*, that such by-laws shall not be contrary to the laws of the United States, or the laws of any of the States assenting to this act, or any of the provisions of this act.

SEC. 13. *And be it enacted*, That if the capital stock of said company shall be deemed insufficient for the purposes of this act, it shall, and may be lawful for the president and directors of said company, or a majority of them, from time to time, to increase the said capital stock by the addition of as many shares as they may deem necessary, for which they may, at their option, cause subscriptions to be received in the manner prescribed by them, or may sell the same for the benefit of the company, for any sum not under their par value; and that they, or a majority of them, shall have power to borrow money for the objects of this act, to issue certificates or other evidence of such loans, and to pledge the property of the company for the payment of the same, and its interest.

SEC. 14. *And be it enacted*, That the president and directors of said company shall be, and they are hereby invested with all

the rights and powers necessary to the construction and repair of a railroad from the city of Baltimore to some suitable point on the Ohio river, to be by them determined, not exceeding sixty-six feet wide, with as many sets of tracks as the said president and directors, or a majority of them, may deem necessary; and they, or a majority of them, may cause to be made, or contract with others for making, said railroad, or any part of it: and they, their agents, or those with whom they may contract for making any part of the same, or their agents, may enter upon and use, and excavate, any land which may be wanted for the site of said road, or the erection of warehouses or other works necessary to said road, or for any other purpose necessary or useful in the construction or repair of said road, or its works; and that they may build bridges, may fix scales and weights, may lay rails, may take and use any earth, timber, gravel, stone, or other materials which may be wanted for the construction or repair of any part of said road, or any of its works; and may make and construct all works whatsoever which may be necessary and expedient, in order to the proper completion of said road; and that they, or a majority of them, may make, or cause to be made, lateral railroads, in any direction whatsoever, in connection with said railroad from the city of Baltimore to the Ohio river; and in the construction of the same, or their works, shall have, possess, and may exercise, all the rights and powers hereby given to them in order to the construction or repair of the said railroad from the city of Baltimore to the Ohio river.

SEC. 15. *And be it enacted*, That the president and directors of said company, or a majority of them, or any person or persons authorized by a majority of them, may agree with the owner or owners of any land, earth, timber, gravel, stone, or other materials, or any improvements which may be wanted for the construction or repair of any of said roads, or of any of their works, for the purchase or use and occupation of the same; and if they can not agree, or if the owner or owners, or any of them, be a feme covert, under age, *non compos mentis*, or out of the county in which the property wanted may lie, when such land or materials shall be wanted, application may be made to any justice of the peace of such county, who shall thereupon issue his warrant under hand and seal, directed to the sheriff of

said county, directing him to summon a jury of twenty inhabitants of said county, not related, nor in any wise interested, to meet on the land, or near to the other property or materials to be valued, on a day named in said warrant, not less than ten, nor more than twenty days after the issuing of the same; and if at said time and place any of said jurors summoned, do not attend, the said sheriff shall immediately summon as many jurors as may be necessary, with the jurors in attendance, to furnish a panel of twenty jurors in attendance, and from them each party, or its, his, her, or their agent, if either be not present in person or by agent, the sheriff, for him, her, it or them, may strike off four jurors, and the remaining twelve shall act as the jury of inquest of damages; and before they act as such, the said sheriff shall administer to each of them an oath, or affirmation, as the case may be, that he "will justly and impartially value the damages which the owner or owners will sustain by the use or occupation of the same, required by the company:" and the jury in estimating such damages, shall take into the estimate, the benefit resulting to the said owner or owners, from conducting such railroad through, along or near to the property of said owner or owners, but only in extinguishment of the claim for damages; and the said jury shall reduce their inquisition to writing, and shall sign and seal the same, and it shall then be returned by said sheriff to the clerk or prothonotary of his county, as the case may be, and by such clerk or prothonotary, filed in his court, and shall be confirmed by said court at its next session, if no sufficient cause to the contrary be shown; and when confirmed, shall be recorded by said clerk or prothonotary, at the expense of said company; but if set aside, the said court may direct another inquisition to be taken in the manner above prescribed; and such inquisition shall describe the property taken, or the bounds of the land condemned, and the quantity or duration of the interest in the same, valued for the company, and such valuation, when paid or tendered to the owner or owners of said property, or his, her, or their legal representatives, shall entitle the said company to the estate and interest in the same thus valued, as fully as if it had been conveyed by the owner or owners of the same; and the valuation, if not received when tendered, may at any time thereafter be received from the company, without costs,

by the said owner or owners, his, her, or their legal representative or representatives.

SEC. 16. *And be it enacted*, That wherever in the construction of the said road or roads, it shall be necessary to cross or intersect any established road or way, it shall be the duty of the president and directors of said company so to construct the said road across such established road or way, as not to impede the passage or transportation of persons or property along the same; or where it shall be necessary to pass through the land of any individual, it shall also be their duty to provide for such individual proper wagon ways across said road or roads, from one part of his land to the other.

SEC. 17. *And be it enacted*, That whensoever it shall be necessary for said company to have, use, or occupy any lands, materials, or other property, in order to the construction or repair of any part of said road or roads, or their works, or necessary buildings, the president and directors of said company, or their agents, or those contracting with them for making or repairing the same, may immediately take and use the same, they having first caused the property wanted to be viewed by a jury, (formed in the manner hereinbefore prescribed in those cases where the property is to be changed or altered by admixture with other substances before such alteration is made,) and that it shall not be necessary, after such view, in order to the use or occupation of the same, to wait the issue of the proceedings upon such view; and the inquest of the jury, after confirmation and after payment, or tender of the valuation, shall be a bar to all actions for taking or using such property, whether commenced before or after such confirmation, or the payment of said valuation.

SEC. 18. *And be it enacted*, That the said president and directors, or a majority of them, shall have power to purchase, with the funds of said company, and place on any railroad constructed by them under this act, all machines, wagons, vehicles or carriages of any description whatsoever, which they may deem necessary or proper for the purposes of transportation on said road, and they shall have power to charge for tolls upon, (and the transportation of persons), goods, produce, merchandise, or property of any kind whatsoever, transported by them along said railway, from the city of Baltimore to the Ohio

river, any sum not exceeding the following rates, viz: on all goods, produce, merchandise, or property of any description whatsoever, transported by them from west to east, not exceeding one cent a ton per mile for toll, and three cents a ton per mile for transportation; on all goods, produce, merchandise, or property of any description whatsoever, transported by them from east to west, not exceeding three cents a ton per mile for tolls, and three cents a ton per mile for transportation; and for the transportation of passengers, not exceeding three cents per mile for each passenger; and it shall not be lawful for any other company, or any person or persons whatsoever, to travel upon or use any of the roads of said company, or to transport persons, merchandise, produce, or property of any description whatsoever along said roads, or any of them, without the license or permission of the president and directors of said company; and that the said road or roads, with all their works, improvements and profits, and all the machinery of transportation used on said road, are hereby vested in the said company incorporated by this act, and their successors forever; and the shares of the capital stock of the said company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burthen by the state's assenting to this law.

Sec. 19. *And be it enacted*, That the said president and directors shall annually or semi-annually, declare and make such dividend as they may deem proper, of the nett profits arising from the resources of the said company, after deducting the necessary current and probable contingent expenses; and that they shall divide the same amongst the proprietors of the stock of said company, in proper proportions to their respective shares.

Sec. 20. *And be it enacted*, That if any person or persons shall wilfully, by any means whatsoever, injure, impair, or destroy any part of any railroad, constructed by said company under this act, or any of their necessary works, buildings, carriages, vehicles or machines of said company, such person or persons so offending, shall each of them, for every such offence, forfeit and pay to the said company the sum of five hundred dollars, which may be recovered in the name of said company by an action of debt, in the county court of the county wherein

the offence shall be committed, and shall also be subject to indictment in said court; and upon conviction of such offence, shall be punished by fine and imprisonment, in the discretion of the court.

SEC. 21. *And be it enacted*, That as soon as this act shall have been passed by the legislature of Maryland, books may be opened, subscriptions received, and the said company organized, and that when organized, the said company and the president and directors of the same, shall have all the powers, rights and privileges granted by this act, and shall be subject to all its regulations in constructing or repairing any of the said railroads or other necessary works or buildings, which may or can be constructed within the limits of the state of Maryland; and in transporting persons, goods, merchandise, or property of any description, along any of said roads; and that the provisions of this act shall be wholly in force, as to all the property of the company which may be situated, or may be within the state of Maryland, and which said company is permitted to hold under this act.

SEC. 22. *And be it enacted*, That if said road shall not be commenced in two years from the passage of this act, and shall not be finished within this state in ten years from the time of the commencement thereof, then this act shall be null and void.

SEC. 23. *And be it enacted*, That full right and privilege is hereby reserved to the citizens of this state, or any company hereafter to be incorporated under the authority of this state, to connect with the road hereby provided for, any other railroad leading from the main route, to any part or parts of this state; *Provided*, that in forming such connection, no injury shall be done to the works of the company hereby incorporated.

LAWS IN VIRGINIA.

An Act passed by the Virginia Legislature to confirm a law passed at the present session of the General Assembly of Maryland, entitled, "An Act to incorporate the Baltimore and Ohio Railroad Company," passed March 8, 1827.

WHEREAS, An act has passed the Legislature of Maryland, entitled, "An Act to incorporate the Baltimore and Ohio Railroad Company," in the following words and figures, viz.:—(See Act.)

Therefore, be it enacted by the General Assembly, That the same rights and privileges shall be, and are hereby granted, to the aforesaid company within the territory of Virginia, as are granted to them within the territory of Maryland. The said company shall be subject to the same pains, penalties and obligations, as are imposed by said act; and the same rights, privileges and immunities which are reserved to the state of Maryland, or the citizens thereof, are hereby reserved to the state of Virginia, and her citizens; except that the said company shall not make, or authorize to be made, any lateral road or roads within the territory of Virginia, without the consent of this legislature; that the said road shall not strike the Ohio at a point lower than the mouth of the Little Kanawha, on said river; that the words "or other property," in the seventeenth section of the above recited act, shall in no case be construed to extend to any property other than materials necessary for the construction or repair of said road, or other works or necessary buildings: and that in obtaining a right to any lands through which the contemplated railroad may be extended, or to any timber, gravel, stone or earth, which shall be necessary to the construction or repair of said road, or other works or necessary building within this Commonwealth. "The Baltimore and Ohio Railroad Company" shall proceed in the same manner as is prescribed in the seventh, eighth, ninth, tenth and twelfth sections of an act, entitled, "An Act prescribing certain general regulations for the incorporation of turnpike companies," passed February the seventh, one thousand eight hundred and seventeen:

except, also, that any injury which may at any time be done within the limits of Virginia to the said road, or other works or necessary buildings, shall at all times be punished according to the laws which may be in force in this commonwealth, for the protection of the public works of the commonwealth of Virginia.

CHAPTER 99.—1846-7.

(Passed March 6, 1847.)

An Act to authorize the Baltimore and Ohio Railroad Company to construct the extension of their railroad through the territory of Virginia.

1. *Be it enacted by the General Assembly*, That the Baltimore and Ohio Railroad Company be, and they are hereby authorized to complete their road through the territory of this commonwealth, so as to pass from a point in the ravine of Buffalo creek, at or near the mouth of Pile's Fork, to a depot to be established by said company on the northern side of Wheeling creek in the city of Wheeling in Ohio county, by such route as upon minute estimates to be made after full examinations and instrumental surveys of the feasible or practicable routes, shall appear to be the cheapest upon which to construct, maintain and work said railroad; which estimates shall be made on like principles and plans, in like manner and upon as great respective amounts of trade and travel as were adopted and employed in the comparative estimates of the company's chief engineer, laid before the meeting of the stockholders of the said company, held in Baltimore, on the twelfth day of July, eighteen hundred and forty-five: *Provided*, That said railroad shall not be made to enter the ravine of the Ohio river at any point further south than the mouth of Fish creek in Marshall county: *And provided*, That if the said railroad, by the cheapest route to the city of Wheeling, which shall not enter the ravine of the Ohio river at any point south of Grave creek in Marshall county, shall appear from the estimates to be made as aforesaid, to be more costly to construct, maintain and work, than it would be by the route passing into the ravine of the Ohio river at or near the mouth of Fish creek, and thence to the city of Wheeling; and if, when the difference of probable

cost between said two routes shall be ascertained as aforesaid, the city of Wheeling shall agree to pay to said railroad company such difference of cost, by the time said railroad shall be completed and opened for transportation to said depot in Wheeling, (which payment it shall be lawful for the said city of Wheeling to provide for and make), then the said railroad company are hereby required to locate and construct their said railroad so that in passing to said depot in Wheeling, it shall not enter the ravine of the Ohio river at any point south of Grave creek.

2. *Be it further enacted*, That to secure to the said city of Wheeling the benefit of the western terminus, all parts of the said railroad between the Monongahela river and said terminus, shall be opened for the transportation of freight and passengers simultaneously; and the aggregate charge for toll and transportation, upon freight and passagers respectively, shall be the same between Baltimore and any point on said road within a direct distance of five miles from the Ohio river, as between Baltimore and Wheeling.

3. *Be it further enacted*, That nothing in this act contained shall be so construed as to entitle said company to any subscription on the part of this commonwealth to the stock of said company, by virtue of any act heretofore passed, and especially by virtue of the several acts passed March twenty-eighth, eighteen hundred and thirty-seven, and April second, eighteen hundred and thirty-eight, concerning the said company; which said provisions in said acts are hereby declared to be no longer in force and of no effect.

4. *Be it further enacted*, That full right and privilege is hereby reserved to the commonwealth, or to any citizen thereof, or any persons or companies who may hereafter be so authorized by the general assembly, to connect or intersect with the said Baltimore and Ohio road, or any branch thereof, either of the said portion of said railroad now constructed, or to be constructed at any point or points thereof within this commonwealth, any railroad, canal or other road for transportation, leading to or from said Baltimore and Ohio Railroad, or any branch thereof, from or to any other part or parts of this commonwealth, and that all reasonable facilities for the full and free enjoyment of the benefit of such connection or connections shall at all times be

afforded by the said Baltimore and Ohio Railroad Company; and upon failure to receive and transport any such freight and passengers according to their turn, upon payment or tender of the lawful or customary tolls, or to furnish other usual and necessary facilities, the said Baltimore and Ohio Railroad Company shall be liable to all the penalties prescribed and provided for offenses or defaults of like kind in the twenty-second section of the said general act, entitled, "An act prescribing certain general regulations for the incorporation of railroad companies," to be recovered in the manner therein provided, or by any action, suit or motion in any of the courts of this commonwealth, having jurisdiction of the subject.

5. *Be it further enacted*, That the said Baltimore and Ohio Railroad Company shall, within six months after the passage of this act, establish a depot at the Chesapeake and Ohio Canal basin, situated between lock number thirty-two and the Shenandoah outlet lock in said canal, or as near thereto as may be practicable; and shall also allow switches to be put in, with sidelings and branch tracks, to be connected from time to time with said switches, to be constructed at the expense of the said Chesapeake and Ohio Canal Company, for the purpose of accommodating and facilitating in the most ready and economical manner practicable, the transfer of passengers and goods, produce, merchandise, or property of any description whatever, from the said railroad to the canal, and to warehouses that may from time to time be there erected by said canal company, or individuals or others, for the accommodation of the trade on the canal, and from the canal and said warehouses to the said railroad; and that the said Baltimore and Ohio Railroad Company shall also establish, in like manner, a depot at the Chesapeake and Ohio Canal basin at Cumberland, and also at such other point or points within the limits of this commonwealth, along or near the line of the said Baltimore and Ohio Railroad, as may hereafter by act of the general assembly of this commonwealth be prescribed; and shall allow all necessary switches, with sidelings and branch tracks, to be connected from time to time with the said switches as aforesaid, to be constructed at the expense of the said Chesapeake and Ohio Canal Company for the purposes aforesaid.

6. *Be it further enacted*, That said company shall be subject

to the provisions of the act of assembly passed on the eleventh day of March, eighteen hundred and thirty-seven, establishing general regulations for the incorporation of railroad companies, with respect to that portion of their road or other improvements now or hereafter to be constructed within this commonwealth, so far as the same are properly applicable: *Provided*, That said Baltimore and Ohio Railroad Company shall not be permitted to charge for transportation or travel to or from Baltimore from or to any point distant more than five miles in a direct line from the Ohio river, more in the aggregate than for transportation or travel from Wheeling to Baltimore, or from Baltimore to Wheeling respectively, nor more in the aggregate from any depot west of Harper's Ferry to Baltimore, or from Baltimore to such depot, than from any other depot more distant from Baltimore to Baltimore, or from Baltimore, to such last mentioned depot.

7. *Be it further enacted*, That the stock, property and profits of said company, so far as the same may be or accrue within this commonwealth, shall be subject to general taxation in like manner and on the same footing with other similar companies within this state: *Provided, however*, That said taxing power shall not be exercised until and unless the nett income of the said Baltimore and Ohio Railroad shall exceed six per centum per annum upon their capital invested.

8. *Be it further enacted*, That the general assembly hereby reserves to itself the power of hereafter altering, amending or modifying any or any part of the provisions of this act: *Provided*, That the rights of property and franchises acquired under this act, and the free use and enjoyment of their rights and privileges, as granted by this or any other former act now in force, shall not be taken away or impaired by any such further act of legislation.

9. *Be it further enacted*. That the city of Wheeling may subscribe to the capital stock of said railroad company such sum, not exceeding one million of dollars, and upon such terms as may be agreed upon between the council of said city and said railroad company.

10. *Be it further enacted*, That the said railroad to be constructed through the territory of Virginia, shall reach or cross

the Tygart's Valley river at or within three miles of the mouth of Three Fork creek in the county of Taylor.

11. *Be it further enacted*, That as a condition upon which the powers and privileges of this act are granted, the said Baltimore and Ohio Railroad Company shall accept this act within six months, and enter upon the construction of the continuation of their road hereinbefore authorized within three years, and complete the same within twelve years after the passage of this act.

12. This act shall be in force from and after the passage thereof.

[Extracts from the General Rail Road Law of Virginia are here inserted, as proper in relation to this road, more than one-half of which formerly lay in that State.]

CHAPTER 118.—1837. VIRGINIA LAW.

(Passed Mar. 11, 1837.)

An Act prescribing certain general regulations for the incorporation of railroad companies.

1. *Be it enacted by the General Assembly*, That whenever it shall be deemed necessary by the general assembly to grant a charter for the incorporation of a company to construct a railroad, the following general provisions shall be deemed and taken to be a part of the said charter or act of incorporation, to the same effect as if the same were expressly re-enacted in reference to any such charter or act, except so far as such charter or act may otherwise expressly provide.

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9. Previously to the institution, and during the pendency of proceedings for ascertaining the damages to the proprietor for the condemnation of his land for the use of the company, the president and directors, their officers, agents, and servants, shall have full power and authority to enter upon all lands and tenements through which they may desire to conduct their railroad, and to lay out the same according to their pleasure, so that no dwelling house, or space within sixty feet of one, belonging to any person, be invaded without his consent; and if they think the interest of the company requires it, to take possession there-

of for the purposes of the company, and also to enter upon, lay out, and take possession of such contiguous land as they may desire to occupy as sites for toll-houses, warehouses, depots, engine sheds, stables, workshops, and other buildings, for the necessary accommodation of their officers, agents, and servants, their horses, mules and other cattle, and for the protection of the property committed to their care: *Provided*, that the land so laid out and occupied on the general line of the railroad shall not exceed, except in deep cuts and fillings, eighty feet in width; that the adjoining land for the sites of buildings shall not exceed one acre and a half in any one parcel. The president and directors shall describe by certain limits the land which they desire to occupy for any of the purposes aforesaid; and it shall be lawful for them to purchase the land so laid out, or any part thereof. If the president and directors can not agree with the owner or owners of the lands so entered on and laid out, on the terms of purchase, it shall be lawful for them to apply to the court of the county in which such land or the greater part thereof may lie; or in case they fail, within twenty days after they shall have taken possession of said land, to make such application; or if, having made the same, they shall fail to prosecute the proceedings thus commenced, diligently to a conclusion, it shall be lawful for the proprietor of the land to make similar application; and upon such application of either of the said parties, the court shall appoint five discreet, intelligent, disinterested, and impartial freeholders, to assess the damages to the owner, from the condemnation of his land for any of the purposes aforesaid. No such appointments, however, shall be made, unless ten days previous notice of the application shall have been given to the said president and directors, or to any one of them, if the proceedings shall be instituted by the proprietor of the land; or if they shall be instituted by the president and directors, then like notice shall be given to the owner of the land, or to the guardian, if the owner be an infant, or to the committee, the owner being *non compos mentis*, if such owner, guardian, or committee can be found within the county; or if he can not be found, then such appointment shall not be made, unless notice of the application shall have been published at least one month next preceding, in some newspaper printed as convenient as may be to the court-house of the county, and

shall have been posted at the door of the court-house on the first day, at least, of the next preceding term of said court. A day for the meeting of the said freeholders to perform the duty assigned them, shall be designated in the order appointing them; and any one or more of them attending on that day may adjourn, from time to time, until their business shall be finished. Of the five freeholders so appointed, any three or more may act, after having been duly sworn or solemnly affirmed before some justice of the peace, that they will, impartially and justly, to the best of their ability, ascertain the damages which will be sustained by the proprietor of the land from the condemnation thereof for the use of the company, and that they will truly certify their proceedings thereupon to the court of the said county.

10. It shall be the duty of the said freeholders, in pursuance of the order appointing them, to assemble on the land proposed to be condemned, and after viewing the same and hearing such proper evidence as either party may offer, they shall ascertain according to the best of their judgment, the damages which the proprietor of the land will sustain by the condemnation thereof for the use of the company. In performing this duty, they shall consider the proprietor of the land as being the owner of the whole fee simple interest therein; they shall take into consideration the quantity and quality of the land to be condemned, the additional fencing which will be required thereby, and all other inconveniences which will result to the proprietor from the condemnation thereof; and shall combine therewith a just regard to the advantages which the owner of the land will derive from the construction of the railroad, for the use of which his land is condemned: *Provided*, that not less than the actual value of the land, without reference to the location and construction of the road, shall be given by the commissioners.

11. When the said freeholders shall have agreed upon the amount of damages, they shall forthwith make a written report of their proceedings, under their hands and seals, in substance as followeth: "We, ..., freeholders, appointed by an order of the county court of....., for the purpose of ascertaining the damages which would be sustained by....., the proprietor of certain lands

in the said county, which the president and directors of the ..... company propose to condemn for their use, do hereby certify, that they met together on the land aforesaid on the.....day of....., the day appointed therefor by the said order, (or the day to which we were regularly adjourned from the day appointed for our meeting by the said order), and that having been first duly sworn, and having viewed the premises, we proceeded to estimate the quantity and quality of the land aforesaid, the quantity of additional fencing which would probably be occasioned by its condemnation, and all other inconveniences which seemed to us likely to result therefrom to the proprietor of said land; that we combined with these considerations, as far as we could, a just regard to the advantages which would be derived by the proprietor of said land from the construction of the railroad, for the use of which the said land is to be condemned; that under the influence of these considerations we have estimated, and do hereby assess the damages aforesaid at the sum of.....

Given under our hands and seals, this ..... day of ....."

At the foot of the report so made, the magistrate before whom the said freeholders were sworn or affirmed, shall make a certificate in substance as follows: "..... county, to-wit: I, ..., a justice of the peace for said county, do hereby certify that the above named freeholders, before they executed their duties as above certified, were solemnly sworn, (or affirmed) before me, that they would impartially and justly, to the best of their ability, ascertain the damages which would be sustained by the above named ....., from the condemnation of the above mentioned land for the use of the ..... company, and that they would certify truly their proceedings thereupon to the court of the said county. Given under my hand, this ..... day of ....."

12. The report of the freeholders so made, together with the certificate of the magistrate as aforesaid, shall be forthwith returned by the said freeholders to the court of the county: and unless good cause be shown against the report, it shall be confirmed by the court and entered of record. But if the said report shall be disaffirmed, or if the said freeholders being unable to agree, shall report their disagreement, or if from any other cause they should fail to make a report within a reasonable

time after their appointment, the court may, at its discretion, as often as may be necessary, supersede them or any of them, appoint others in their stead, and direct another view and report to be made, in the manner above prescribed. In default of the payment or tender of the amount of damages so assessed, to the proprietor, or of the payment of the same into the court, when, for good cause shown, the court shall have so ordered it, the court shall render judgment in favor of such proprietor for the amount of said damages, and double costs; and may thereupon either compel the company to pay the same into court, or award process of execution therefor, as to them may seem right. And when such judgment shall be satisfied by the payment of the money into court or otherwise, the title of the land for which such damages were assessed, shall be vested in the company, in the same manner as if the proprietor had sold and conveyed it to them.

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15. If the president and directors, on entering upon the land of any person under authority of this act, shall, by themselves or their officers, do any wanton or wilful injury to such land or its appurtenances, or the crops growing or gathered, or to any other property thereon, the company shall pay to the persons so injured, double the amount of damages, which shall be assessed by a jury, in any proper action therefor; and if such injury be done by any person or persons who have contracted with the company for the construction of any of their works, or by any persons in their employment, such contractor or contractors shall be responsible to the injured party, in the like amount; and in any action brought for the purpose, the defendant may be held to bail upon affidavit before any judge or justice of the peace, that there is good cause to believe that he will leave the commonwealth before a final judgment can be obtained.

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20. The works of the company shall be executed with diligence, and if they be not commenced within two years after the passage of the act of incorporation, and finished within the period which may be therein prescribed; and in case the company, at any time after the said road is completed, shall abandon the same, or cease to use and keep it in proper repair, so

that it shall fail to afford the intended accommodation to the public for three successive years, then, and in that case, also, their charter shall be annulled as to the company, and the state of Virginia may take possession of the said railroad and works, and the title thereto shall be vested in the said state so long as it shall maintain the same in the state and manner required by said charter; otherwise the lands over which the said road shall pass, shall revert to and be vested in the person or persons from whom they were taken, by concession or inquisition, as aforesaid, or their heirs or assigns.

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22. Upon the railroad the company shall have the exclusive right of transportation, and when a portion thereof shall be opened for transportation, they shall at all times furnish and keep in good repair the necessary machines, carriages, and other requisites for the safe and convenient transportation of persons and property. It shall be their duty, at all times, upon the payment or tender of the lawful or customary tolls, to transport to any convenient place of delivery on the railroad, which the owner of the goods may indicate, and there to deliver all articles which shall be delivered to them for transportation, or offered to them in proper condition to be transported, at some place on the road convenient for the reception thereof. They shall give no undue preference in transportation of the property of one person over that of another, but as far as practicable shall carry each in the order of time in which it shall be delivered or offered for transportation with the tolls paid or tendered. If the company, or any of its officers or agents, shall fail to receive, transport, or deliver in due time, any property so offered or delivered to them, or shall fail to take up or set down any passenger or passengers at such convenient point as he or they may desire, upon the payment or tender of passage money, or shall demand and receive more than the lawful tolls or rate of transportation, they shall forfeit and pay to the injured party not less than twenty-five, nor more than one hundred dollars, at the discretion of the court, to be recovered by motion, in the county or corporation court, or superior court of law for the county or corporation in which such preference has been given; or in which they have refused to comply with the requisitions of this section: *Provided*, ten days notice of such

motion be given to the president of the company; and shall, moreover, be liable to an action on the case, in which full damages and double costs shall be recovered: *Provided*, the company shall not be required to put down or take in passengers, produce or merchandise, except at their depots or other regular stopping places, and except when any railroad or stage line may intersect the same.

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27. At the end of one year from the completion of the railroad, the president and directors shall report to the board of public works a statement, in such form as the said board shall require, showing the whole amount of capital stock expended in the construction of the railroad, with the several heads of expenditure, the amount of tolls received during each preceding year, and the nett loss or profit on the capital expended. And at the expiration of every period of three years, after the said one year from the completion of the railroad, they shall return to the said board a similar statement, in like form, showing the amount and kinds of expenditures and receipts, and the nett profits of each year of such period. And for each failure to make the said returns, the company shall be liable to a penalty of one thousand dollars, recoverable on ten days notice in any court having jurisdiction.

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30. The full right and privilege is hereby reserved to the legislature of connecting with any railroad which may be constructed agreeably to the provisions of this act, any other railroad or railroads leading from either termination of, or diverging from, the main route of the same, or of any branch thereof, to any other part or parts of the state.

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32. The company shall not employ its capital or be engaged in any transactions or business but such as may be necessary to the construction of their railroad and works, and their management and preservation; nor shall they subscribe to the stock of any other incorporated company, except for the temporary investment of surplus funds.

33. If any person or persons shall, wilfully and maliciously, remove or disturb any of the company's constructions, or place, designedly and with evil intent, any obstructions on the line of

their railroad, so as to jeopardize the safety or endanger the lives of persons traveling or employed on the same, such person or persons so offending shall be deemed to be guilty of a high crime and midemeanor, and if such person or persons be free, he, she or they shall be adjudged, on conviction, to be imprisoned in the common jail or penitentiary house, for a term not less than two nor more than five years; and if such person or persons be a slave or slaves, he, she or they shall suffer death without benefit of clergy.

34. If any person or persons shall wilfully destroy or otherwise injure any railroad, or any buildings, engines, cars or other property whatever, connected therewith or belonging thereto, tending to obstruct or interrupt the operations of the company, but without endangering the safety of passengers or others, he, she or they shall forfeit and pay to the company three times the actual damage so sustained, to be sued for and recovered, with full costs, in any court having cognizance thereof, by action of debt, in the name and for the use of the company; and shall moreover be punishable as for a misdemeanor.

35. Any part of any charter or act of incorporation granted agreeably to the provisions of this act, shall be subject to be altered, amended or modified by any future legislature, as to them shall seem proper; except so much thereof as prescribes the rate of compensation or tolls for transportation: *Provided*, That the rights of property acquired under this act, or any other act adopting the provisions of this act, shall not be taken away or impaired by any future act of the legislature.

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37. This act shall be in force from its passage.

LAWS OF WEST VIRGINIA.

[Extract from the general laws of West Virginia governing railroad and other companies, and binding upon the said company herein.]

CHAPTER LIV.

Of the Incorporation of Joint Stock Companies in Pursuance of Article Eleven of the Constitution of the State.

COMPANIES INCORPORATED BY OTHER STATES.

30. Any corporation duly incorporated by the laws of any state or territory of the United States, or of the District of Columbia, or of any foreign country, may, unless it be otherwise expressly provided, hold property and transact business in this State, upon complying with the requirements of this section, and not otherwise. Such corporation so complying shall have the same rights, powers and privileges, and be subject to the same regulations, restrictions and liabilities, that are conferred and imposed by this and the fifty-second and fifty-third chapters of this code, and by chapter twenty of the Acts of 1885, on corporations chartered under the laws of this State. Every such corporation shall file with the secretary of state a copy of its articles of association and of the law and authority under which it is incorporated. The secretary of state shall issue to every such corporation, complying with the provisions of this section, a certificate of the fact of its having done so, which certificate shall be filed and recorded in the office of the clerk of the county court of the county, or one of the counties in which its business is conducted. Such corporation shall also file, in the said clerk's office, a copy of its charter, to be kept and preserved therein. Every railroad corporation doing business in this State under the provisions of this section, or under charters granted or laws passed by the State of Virginia, or of this State, is hereby declared to be, as to its works, property, operations, transactions and business in this State, a domestic corporation, and shall be so held and treated in all suits and

legal proceedings which may be commenced or carried on by or against any such railroad corporation, as well as in all other matters relating to such corporation. No railroad corporation which has a charter, or any corporate authority, from any other state, shall do business in this State, as the lessee of the works, property or franchises of any other corporation or person, or otherwise; or bring or maintain any action, suit or proceeding in this State, until it shall, in addition to what is hereinbefore required, file in the office of the secretary of state a writing, duly executed under its corporate seal, accepting the provisions of this section and agreeing to be governed thereby, and its failure so to do, may be pleaded in abatement of any such action, suit or proceeding; but nothing herein contained shall be construed to lessen the liability of any corporation, which may not have complied with the requirements of this section, upon any contract, or for any wrong. Every such corporation which shall do business in this State, without having complied with the provisions of this section, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than five hundred dollars nor more than one thousand dollars for each month its failure so to comply shall continue. Prosecutions under this section shall be in the county in which the seat of government is. For every certificate issued under this section the secretary of state shall be paid by the corporation a fee of five dollars.

See Acts 1885, p. 60; 1875, ch. 63; 1881, ch. 17; 1882, ch. 97; 1887, ch. 73.

JOINT RESOLUTION in relation to the Baltimore and Ohio Railroad Company, and directing the Attorney-General to institute judicial proceedings against said company under certain contingencies. (Acts of W. Va., 1871, page 282.)

Be it resolved by the Legislature of West Virginia:

That unless the said Baltimore and Ohio Railroad Company shall, on before the first day of July, 1871, communicate to the attorney-general of this State its unreserved recognition of the fact that the said act of the general assembly of Virginia, passed on the sixth day of March, 1847, is binding upon said company, and that the said company is subject to, and will thereafter be

governed by, its provisions, and shall in the meantime so modify its tariff of charges for freight and passengers, in pursuance of the proviso contained in the sixth section of said act, as not to discriminate thereafter illegally and unjustly and oppressively against the trade and travel of the citizens of this state, it shall then be the duty of the said attorney-general, and he is hereby required to institute proceedings against said Baltimore and Ohio Railroad Company, in the proper judicial tribunal of this state, by information, in the nature of a *quo warranto*, or by such other judicial proceedings as the said attorney-general may think most effective to enforce a compliance on the part of said company with the several provisions of its charter, or to abrogate the same.

Resolved, That should the said company make such communication as is mentioned in the foregoing resolution, the attorney-general is hereby requested to deliver the same to the secretary of state, by whom it shall be filed in his office.

Resolved, That a copy of these resolutions be, by the clerk of this house, communicated to the president of the said Baltimore and Ohio Railroad Company.

Adopted, February 28, 1871.

To the Attorney-General of the State of West Virginia:

In conformity to the Resolutions of the Legislature of West Virginia, passed at the session thereof, which commenced in January, 1871, concerning this company, the Baltimore and Ohio Railroad Company doth hereby certify and communicate to the said Attorney-General its unreserved recognition of the fact, that the act of the General Assembly of Virginia, entitled, "An Act to authorize the Baltimore and Ohio Railroad Company to construct the extension of their railroad through the territory of Virginia," passed March 6th, 1847, is binding upon this company, and that this company is subject to, and will hereafter be governed by, its provisions.

In testimony whereof, the said company has caused these presents to be signed by its president and its corporate seal to be hereto affixed.

Done and certified, signed and sealed at Camden Station, the principal place of business of said company, at Baltimore, in

the State of Maryland, this twentieth day of June, in the year one thousand eight hundred and seventy-one.

[SEAL OF B. & O. R. R.]

J. W. GARRETT,
President B. & O. R. R. Co.

STATE OF WEST VIRGINIA,

OFFICE OF SECRETARY OF STATE.

I, Henry S. Walker, Secretary of State of the State of West Virginia, do hereby certify that the foregoing and annexed writing is a true and correct copy of a paper writing filed in this office, on the nineteenth day of January, eighteen hundred and seventy-two, dated June 20th, 1871, and signed by "J. W. Garrett, Prest. B. & O. R. R. Co.," as appears from the files in my said office.

Given under my hand and the Great seal of the said State, at the city of Charleston, this twenty-fourth day of September, 1889.

[G. S.]

HENRY S. WALKER,
Secretary of State.